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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 17

PARTMAR CORPORATION AND FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.,
Respondents.

PETITION FOR REHEARING.

RUSSELL HARDY,
Attorney for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING.

Partmar Corporation and Fanchon & Marco, Inc., respectfully petition the Court for a rehearing upon the opinion and judgment entered February 8, 1954, affirming a judgment dismissing their counterclaims, and for reasons therefor state:

1. The complaint in the eviction suit in which the counterclaims were dismissed alleged that in 1938 the United States had filed suit against Paramount and others for violations of sections 1 and 2 of the Sherman Act (i.e., for unlawful conspiracy and monopolization), that a trial was had, and on December 31, 1946, the District Court had entered a judgment against the defendants. The complaint stated that the government suit was the same case decided by the District Court on June 11, 1946, and later by this Court on May 3, 1948. (*United States* v. *Paramount*, 66 F. Supp. 323; 334 U.S. 131.) The allegation was admitted

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in the Answer. (R. 12-13, 28) The fact of conspiracy and monopolization, therefore, became a conclusively established fact in this case against respondent in favor of petitioner, as to the whole length and breadth of the conspiracy and monopolization found and described in the opinions of the District Court and this Court.

2. By all rules of estoppel, *res judicata* and judgment, the fact of conspiracy thereupon became completely, irrevocably and permanently established against respondents and in favor of petitioners in the eviction suit and for the counterclaims. The issue of conspiracy being thus automatically settled, there was no necessity for proof or disproof on the subject. Consideration and decision by the court became unnecessary and inappropriate as to the existence or non-existence of conspiracy. So also it became legally impossible for the court to make a finding or judgment against conspiracy in favor of respondents.

3. If it be thought, however, that this estoppel as to conspiracy was thereafter prevented, cancelled or avoided, that result could have been accomplished, if at all, only by amendment of the complaint, before, during or at the close of the trial to conform to the evidence or otherwise. But no such amendment was at any time sought or made.

4. If it be thought that the estoppel could have been avoided by construing conspiracy out of the complaint, the answer is that this did not occur, but if it had occurred it would then have become legally impossible to derive from the eviction suit an estoppel against conspiracy applicable to the counterclaims.

5. The truth is that the trial court has not in fact made a finding or judgment against that conspiracy and monopolization. It has merely found that *on the evidence in the eviction case* it had not been proved that the franchise contract for furnishing pictures for the theatre, was *connected with* that conspiracy and monopolization. Nowhere in the

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findings, conclusions of law, opinion or judgment of the trial court is there any statement to the effect that the conspiracy alleged in the Complaint, admitted in the Answer, and again alleged in the Counterclaims, did not exist. If it was true that the franchise was not connected with the conspiracy, that is not in the slightest degree inconsistent with the existence of the conspiracy. In the government Paramount case this Court in affirming the existence of that conspiracy, although failing to find any connection between it and franchises, applied that distinction. This Court thus clearly held that the conspiracy and franchise were not inseparable. The statements of the trial court are carefully framed to avoid negativing the conspiracy. The statement in the finding that "Paramount, not in conjunction with any other major studio, entered into the franchise", is typical. (R. 103) This is clearly not a finding that Paramount and the other major studios were not engaged in the conspiracy found in the government case and alleged in the Counterclaims.

6. The counterclaims contain no allegation to the effect that they are based on and limited to the franchise, or upon its legality or illegality, standing alone or as part of the conspiracy and monopolization. The District Court has not construed the counterclaims to that effect.

7. The statement in the opinion of this Court that in the counterclaims "The conspiracy was alleged to have resulted in the imposition of excessive terms and conditions on Partmar *by the lease and franchise agreement*", is not correct. The allegation does not attribute the excessive terms and conditions to the lease and franchise but to the conspiracy. In that charge no reference is made to the franchise and lease. It states merely that "The plaintiff, and the third-party defendants have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them and exhibited at the Paramount

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Theatre, from March 2, 1933, to the present time." (R. 38-39)

8. The counterclaims begin with an allegation of the conspiracy on which they are based, i.e., that the counterclaim defendants have "engaged in a conspiracy in restraint of trade and commerce among the States, in the distribution and exhibition of motion pictures, in violation of the Act of July 2, 1890, that is to say, the same conspiracy stated in the complaint in that case", the same case of *United States* v. *Paramount* alleged in the eviction suit complaint. This allegation made clear that petitioners were relying on the conspiracy in the government case in its whole length and breadth.

9. Under that allegation petitioner was entitled to recover for any injury resulting from any of the means used in the course of or to effectuate that conspiracy.

10. The references to the lease and franchise were descriptive statements simply for the purpose of showing how the power derived from the conspiracy had been used to impose excessive picture and theatre rentals on petitioners. They were appropriate but not necessary and controlling statements. As the primary purpose and ultimate result of this conspiracy was to enable the conspirators to get more money than would otherwise have been possible, the particular terms and conditions of the contracts were immaterial to the right of the petitioners to recover the excessive money charges that had been made. All that was necessary to support their claim was (1) the fact of the conspiracy, and (2) the payment of the film and theatre rentals affected by that conspiracy. Reference to the franchise will show that it was merely an agreement to make contracts in the future for ten years and named prices for pictures for the first year only. (R. 252, 256-262)

11. The statement in the opinion that "Partmar vigorously contended in brief and in argument that the *lease*

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of the theatre and the franchise for 'first-run' exhibitions *did not in any way* violate the Sherman Act", is not correct. We understand this refers to petitioners' brief and argument in the trial court, printed at Record 45-70. In the eviction suit and counterclaim there was no issue as to the legality of the lease. The allegation in the counterclaims that the theatre rental was excessive because of the conspiracy and monopolization did not amount to an attack on the intrinsic legality of the lease.

12. Petitioners' brief in the trial court does not mention the *lease*. That brief dealt solely with the legality of the franchise on the basis, and solely on the basis, of the evidence presented by respondents at the trial. Respondents and the trial court had carefully framed the issue as confined to the legality of the franchise standing alone. This limitation was consistently applied by the Court, and is put beyond any doubt by the ruling excluding the judgment in the government case as evidence of anything but the fact that franchises had been enjoined, which meant refusing to receive it as any evidence of the conspiracy and refusing to give it an estoppel effect in that regard against respondent.

13. Petitioners were, therefore, required to confine their brief and argument to the narrow limits of the evidence. Their brief begins by stating the narrow issue to be discussed, using the words of respondents, as "the *inherent* validity or invalidity" of franchise. (R. 46) The brief then deals seriatim with the following propositions: "No interstate commerce has been alleged *or proved.*" (R. 48) "There was no allegation *or proof* of conspiracy." (R. 52) "*There is no evidence in this case* of the facts found in the government case as to admission prices". (R. 57) (Had the trial court not limited the judgment in the government case as stated, there would have been conclusive evidence in the case against respondents of unlawful admission price fixing.) "*A single contract between one film company and*

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one exhibitor, is not violative of the Sherman Act." (R. 58) *"On the evidence in this case* the Partmar franchise is neither one of a system" etc. (R. 65)

14. These propositions not only did not amount to an argument that the franchise "did not in any way" violate the Sherman Act, but they were carefully, intentionally and necessarily limited to the one specific "way" to which the evidence was limited.

15. The statement in the opinion that "Paramount did not limit its contention of illegality of the agreement to nonconspiratorial aspects of the antitrust laws, but argued that if the agreements were illegal in any way it had the right to possession", is not correct, if it means that the evidence at the trial afforded the necesssary basis for such an unlimited contention. As there was no evidence of the conspiratorial aspects, the contention, if made, was meaningless. The important and controlling ruling of the trial court excluding the judgment in the government case as evidence of conspiracy, effectively eliminated conspiracy as an issue. The Brief for Respondents in this Court states that "petitioners never offered any evidence of a conspiracy". (p. 26) Nowhere in that brief is any statement made to the effect that respondents offered any evidence of conspiracy. It must follow that it was impossible to determine *on the evidence* in this case that the franchise was *not connected* with conspiracy.

16. To prove such a connection it would be necessary to prove two facts in addition to the franchise: (1) that a conspiracy existed, and (2) there was a connection between the conspiracy and the franchise.

17. The statement in the opinion that the lease and franchise were "renumerative", is not correct, if it means renumerative to Partmar. The statement is, "It thus insisted that the remunerative lease and franchise agreements were still valid and subsisting, and that Paramount

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had no right to possession." The adjective "remunerative" indicates to petitioners that it is believed they have not in reality suffered the damages alleged in the counterclaims. Statements in respondents' brief to the effect that by defeating eviction, Partmar retained "benefits", including an exclusive first run of the Paramount pictures, which are probably the basis in part of the statement in the opinion, are contradicted by the record. (Respondents' Brief, pp. 15, 34, 79) The franchise, having been terminated prior to and as a basis for the eviction suit, was not continued or resumed at any time. After termination it was legally and factually as dead as a doornail. The District Court found that the "franchise agreement did not provide for an exclusive first run" for Partmar. (R. 103)

18. That the lease was highly remunerative to respondents, however, appears from the fact that it provided for a rental of 15 per cent of the gross receipts plus 50 per cent of the net receipts of Partnmar. (R. 225-227) As the subject of "benefits" and the supposed "remunerative" character of the contracts, has been adverted to, although outside the issues and record, petitioners respectfully beg leave also to refer to information which would have been shown on a trial of the counterclaims, to contrast the actual net profits of Partmar and of Paramount for the period of 1942-1947, as follows:

Partmar	2.46 per cent
Paramount	13.62 per cent

19. We respectfully and most earnestly urge that this case should be decided on the elementary principle that the courts in the federal system will not entertain the suit of one who bases his claim immediately and solely on his own violation of federal law, and that courts are without jurisdiction to proceed any further in such a case than shall be necessary to discover the character of the suit. This was such a suit. It was not brought to recover property belonging to respondent, but to deprive petitioners of their

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property in a lawful leasehold estate for which they had paid and were continuing to pay the full money consideration long previously agreed to by respondents.

20. The opinion of this Court states that respondents did not limit their contention of illegality, "but argued that if the agreements were illegal *in any way*", they were entitled to evict Partmar. The fact that eviction was not granted does not cure the vice of entertaining a plea based on unlawful action. From that most immoral and wrongful procedure the trial court has derived, and this Court has made finally effectual, an estoppel against petitioners' counterclaims which is far more beneficial and valuable to respondents than the eviction of Partmar.

21. The actual—certainly the unintended—repudiation of this salutary and necessary principle, has received only the slightest notice in the opinion of this Court, in the fragmentary statement that respondent "was in the anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws." If, however, we are wrong in the belief that the Court has overlooked the highly important general public significance of its decision in this regard, we respectfully submit that this aspect of the case should be fully stated and made unmistakably clear.

RUSSELL HARDY
Attorney for Petitioners.

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I hereby certify that this petition for rehearing is presented in good faith and not for delay.

RUSSELL HARDY

February 23, 1954.

Certificate of Service.

I certify that a copy of this Petition For Rehearing has been served on O'Melveny & Myers, attorneys for respondents, by mailing a copy to them by first class mail, postpaid, at 433 South Spring Street, Los Angeles 13, California, on February 23, 1954.

RUSSELL HARDY
Attorney for Petitioners

February 23, 1954.

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